if Dunstan knew the reason why the money was taken, he chose to say nothing about it. In the light of what we have just said, it is clear that there was nothing in the prosecution evidence to dispute the truth of the appellant's statement that his intention in taking the money and keeping it with him in his flat was to pay the lawyer. If we may say so, there was, on the contrary, some evidence to support the truth of his statement. There is, therefore, substance in the complaint that the conviction in this case was unreasonable and cannot be supported having regard to the evidence before the court.

In his judgment the learned trial judge has referred to the breach of Treasury regulations by the appellant. In his view the appellant committed the breach for having kept the money in his flat and not in the prison office safe as required by the regulations. We do not know how this can have any bearing on the question of dishonest intention. The truth is, the money in this case was the personal property of the prisoner and as such could be used by him in any way he wished. There was the evidence of Dunstan who said that the prisoner was given some money to use when he attended the preliminary enquiry at Binatang. There was also the evidence of the $606 which was given to the appellant in September, 1970 and in respect of which he has been acquitted. This amount was in the appellant's possession until he handed it to the police on January 3, 1971 and nothing was said about any breach of the Treasury regulations. We do not think we need say any more about this.

One last point which we wish to mention here is the view expressed by the learned trial judge with regard to the conduct of defence witness, Rama Das (DW1). He was called by the defence to give evidence to show that Dunstan was not worthy of credit. He stated on oath that he, while acting as the officer-in-charge of the prisons, had called upon Dunstan to account for the loss of $10 which belonged to another prisoner named Matthew Langei. Threatened with disciplinary action, Dunstan had refunded the amount. The trial judge rejected this evidence on the ground that the witness being a friend of the appellant was an interested witness. Not only that, the trial judge also said that Dunstan has received "a raw deal at the hands of acting Superintendent of Prisons, Rama Das." and was strongly of the opinion that the matter should be further investigated by the Government. We can find no basis for this view. Unless there is clear evidence to show that a witness at the trial is interfering in the proper administration of justice, trial judges should refrain from expressing opinion or making recommendations as in this case.

For the reasons already stated, we would allow this appeal, quash the conviction and set aside the sentence. Fines, if paid, are to be refunded.

Appeal allowed.

Solicitors: *Battenberg & Talma.*

LIM CHOW KENG v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Ong Hock Sim F.J. and Syed Othman J.) December 8, 1972]

[Kuala Lumpur — Federal Court Criminal Reference No. 3 of 1972]

Criminal Law and Procedure — Appeal against conviction and sentence — Appeal against sentence not pursued — Appellate court enhancing sentence in revision — No opportunity given to appellant to show cause — Criminal Procedure Code (F.M.S. Cap. 6), s. 325(ii).

In this case the applicant had appealed to the High Court against conviction and sentence. He did not however pursue the appeal against sentence. The learned judge acting in revision enhanced the sentence. Subsequently the learned judge reserved for the Federal Court the following question of law: "Whether having regard to the provisions of section 325(ii) of the Criminal Procedure Code (F.M.S. Cap. 6) the High Court may enhance sentence without giving a convicted person notice of his intention to do so or without an opportunity being given to show cause why the sentence should not be enhanced".

Held: in the circumstances as the convicted person had not been given an opportunity to be heard before the order to his prejudice was made, the answer to the reference should be in the negative. The High Court should not exercise the power to enhance the sentence without giving the convicted person notice of its intention to do so or without an opportunity being given to show cause why the sentence should not be enhanced.

Case referred to:-

(1) *In re Chunbidya & Ors.* (1934-1935) L.R. 62 I.A. 36.

FEDERAL COURT.

Datuk S. P. Seenivasagam for the appellant.

Shaik Daud bin Haji Mohamad Ismail (Deputy Public Prosecutor) for the respondent.

Azmi L.P.: The applicant was convicted in the Sessions Court of having corruptly accepted for himself from a certain person a gratification of a sum of $1,000 as a reward for forbearing to take action against another person for an alleged offence of using a vehicle whilst carrying goods weighing in excess of the permitted weight, an offence punishable under section 4(a) of the Prevention of Corruption Act of 1961 and was sentenced to a term of imprisonment of 6 months and to a fine of $1,000 and also ordered to pay $500 to the complainant.

The applicant appealed to the High Court against the conviction, sentence and the order to pay the compensation.

In his petition of appeal he stated in reference to the sentence in the following terms: —

"(9) The sentence is manifestly excessive having regard to your petitioner's record of service, character and antecedents."

For some reasons not apparent from reading the record of appeal nothing was mentioned by both counsel for the applicant and the learned Deputy Public Prosecutor as to the sentence passed on the applicant. The learned judge after hearing counsel's arguments reserved his judgment and on a subsequent date in a written judgment dismissed the appeal against conviction and in reference to the sentence stated as follows (We are going to quote only the relevant parts of the paragraph): —

"The appeal against sentence was not pursued although on record the appellant had appealed against both conviction

and sentence.... Pin prick sentence does not serve any useful purpose. It does not amount to punishment. In order to be a punishment a substantial term of imprisonment is essential. In my view the sentence imposed by the learned president does not reflect the gravity of the offence.

In revision I set aside that sentence and substitute it with a sentence of 2 years imprisonment and order refund of $500 to the complainant."

Subsequently the applicant applied under section 66 of the Courts of Judicature Act 1964 to the learned Appellate Judge to reserve for the decision of the Federal Court two questions of law. The learned judge rejected one of the questions but allowed the other which reads as follows: —

"Whether having regard to the provisions of section 325(ii) of the Criminal Procedure Code (F.M.S. Cap. 6) the High Court may enhance sentence without giving a convicted person notice of his intention to do so or without an opportunity being given to show cause why the sentence should not be enhanced."

It will be apparent from the terms of reference that we are asked to say whether the High Court in the circumstances of the case has the power, in exercise of its revisionary jurisdiction, to enhance the sentence without prior notice of its intention to do so to the applicant or without an opportunity being given to show cause as required under section 325(ii) of the Criminal Procedure Code.

Chapter XXXI of the Code which deals with revision gives power to a judge to call for and examine the record of any proceedings before any inferior court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed. He may thereupon in such a case or in any other case which otherwise had come to his knowledge, in his discretion exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code. The words "or in any other case which otherwise had come to his knowledge" would appear to show that his power of revision may be exercised by the High Court in a matter which comes to him by way way of an appeal. See *In re Chunbidya & Ors.*[1] a Privy Council decision reported at page 36 of the Law Reports Indian Appeals Vol. LXII — 1934 — 1935. In other words it is not disputed that in the instant case, the learned judge has authority to deal with the sentence of the case. But it was argued that he had however, failed to consider the provisions of section 325(ii) of the Code which provides as follows: —

"(ii) No order under this section shall be made to the prejudice of the accused, unless he has had the opportunity of being heard, either personally or by advocate in his own defence."

An enhancement is without doubt an order to the prejudice of the applicant and, if the judge purported to act under Chapter XXXI, compliance with section 325(ii) is mandatory. Such opportunity had clearly not been given in this case.

In this case there is no doubt that since the appeal against sentence had not been withdrawn, the learned trial judge had the power to deal with the matter. That might be so, but under the terms of the reference we have no doubt that in the circumstances he has no such power to do so and in the event the answer to this reference would be in the negative.

The question now is what we should do next. Under section 66(5), this court may in the circumstances of the present case make such orders as the High Court might have made as it may consider just for the disposal of an appeal. This court may set aside the order of the High Court since it was wrong on a question of law. We therefore restore the original sentence made by the Sessions Court.

One matter however needs observation. It seems to have been thought that in an appeal from conviction only the judge, if he wishes to enhance the sentence, has to resort to revisionary powers, as was done in India prior to 1955, when no power to enhance was vested in the appellate judge (section 423 of the Indian Code) though power of enhancement is given in section 439, (in *pari materia* with our section 325) by way of revision. In our Code, on the other hand, section 316 clearly empowers the court, whether on appeal from conviction only or on appeal as to sentence only, to reduce or enhance the sentence and it is unnecessary therefore to have recourse to Chapter XXXI. Though this power exists — and there is no provision requiring notice to be given to show cause, as laid down in the proviso to subsection (1A) of section 423 of the Indian Code — it is desirable that, before exercising such power, the judge should ask appellant whether he has anything to say.

Original sentence restored.

Solicitors: *Seenivasagam & Sons.*

SIVASUBRAMANIAN v. CHONG CHEONG WAH & ANOR.

[O.C.J. (Syed Othman J.) December 13, 1972]

[Kuantan — Civil Suit No. 114 of 1970]

Control of Publications — Seizure of article suspected to contain any prohibited or prejudicial publication — Impounding of prejudicial publication — Control of Imported Publications Act, 1958, ss. 9(1) and 18.

In this case the police searched the plaintiff's house and seized a number of books. Subsequently all of these books were returned except one, which it was claimed "had been declared prejudicial to security". The plaintiff sought the return of the book and damages for its detention.

Held: (1) the police officer must have suspected the books to contain prejudicial pubilcations when he seized them and therefore the seizure of the books was lawful;

(2) there was no evidence to show that the book was impounded in accordance with the Control of Imported Publications Act and therefore the impounding was unlawful and the book should have been returned to the plaintiff or damages paid to him. As the book was destroyed by fire the plaintiff should be paid the cost of the book fixed at $3.60.

CIVIL SUIT.

Lim Kean Chye (*K. K. P. Nathan* and *S. Sivasubramanian* with him) for the plaintiff.

Abdul Razak bin Datuk Abu Samah (Senior Federal Counsel) for the defendants.

Syed Othman J.: This case is over a book, a paper-back worth $3.60. But it involves a man's right